PRIVY COUNCIL REPORT

[PRIVY COUNCIL]

LORDS ATKIN, THANKERTON, PORTER & WRIGHT AND SIR GEORGE RANKIN

December 12, 1938

Yeo Hock Cheng *v.* Rex

[SINGAPORE ASSIZE CASE No. 1 of 1938—CRIMINAL APPEAL No. 5 of 1938]

Evidence Ordinance (Cap. 13)—Construction of section 32 (1).

A petition for special leave to appeal in *forma pauperis* was brought before the Judicial Committee of the Privy Council with a view to appealing from the decision of the Court of Criminal Appeal which is reported at 7 Malayan Law Journal (SSR) p.104. Leave was refused and, as is usual in such cases, the reasons for such refusal were not formally given but the following report is extracted from a shorthand note of the hearing as the *dicta* of their Lordships are of interest in respect of the points referred to in the headnote hereto.

PETITION for leave to appeal to the Privy Council.

R. K. Handoo for the Petitioner.

Kenelm Preedy for the Crown.

Handoo for the Petitioner made four submissions of which the only one material to this report was that under section 32 (1) of the Evidence Ordinance only those statements made by the deceased are admissible which, relating to the cause of the deceased's death or to the circumstances of the actual transaction which resulted in his death, are made if the deceased has been incapacitated from the injury or illness from which he subsequently dies.

He cited from *Stephen* on the Indian Evidence Act the following passages:—

Page 2: "the Indian Evidence Act is little more than an attempt to reduce the English Law of evidence to the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India" and on page 131 "The provisions of this Act are all made in order to meet real difficulties which arise in practice in England and which must of necessity arise over and over again and give occasion to litigation unless they were specifically provided for beforehand."

Lord Thankerton: That does not carry me very far. You have still to look at the Act and see what it says.

Mr. Handoo: Yes, my Lord; but, in construing this particular Act, I submit that regard must be had to the state of the common law as it existed before the Act came into force.

Lord Atkin: No; that is quite a wrong view in construing a Code. That was held a long time ago. You have to look at the words of the Act, and, if there is any ambiguity at all, you may possibly refer to the past law. In the first place, you have to look at the plain meaning of the words.

The following discussion then ensued:—

Lord Atkin: There is this evidence, that the accused and the deceased girl were seen together in the evening at nine o'clock. What do you say about it? Have you the section before you?

Mr. Handoo: Yes, my Lord.

Lord Atkin: Let us look at the section.

Mr. Handoo: Shall I read it, my Lord? It is section 32 (1).

Lord Atkin: Yes.

Mr. Handoo: Section 32 is: "Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases."

Lord Atkin: May we just stop there. That has nothing to do necessarily with the person who has been murdered, still less with the person who has been incapacitated by anything that is relevant to the issue. It is a person who cannot be found or who has become incapable of giving evidence from any reason, sickness or anything of that sort. Surely there cannot be any doubt about that: "in the following cases: (1) When the statement is made," and so on.

Mr. Handoo: "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

Lord Atkin: What do you say about that? The only objection you have made to it so far is that they are only admissible when made after the deceased has been incapacitated.

Mr. Handoo: In making that submission, my Lords, I have mentioned that those statements have to relate to the cause of the deceased's death or to the circumstances of the transaction.

Lord Atkin: Yes; That seems to be the point in this case. The girl is going out. Supposing she had said: "I am going to see Cheng tonight by the riverside." Would that be admissible within the section?

Mr. Handoo: I submit not, my Lords.

Lord Atkin: Why not? That is a statement as to the circumstances of the transaction with regard to the death. "Transaction" is not a very good phrase, I think.

Sir George Rankin: No; it is not a good phrase.

Lord Atkin: No: but it leads right up to the story of the meeting of the two people, the meeting of the murdered person and the accused. Would not that be relevant?

Mr. Handoo: I submit, my Lord, that the circumstances there must mean the immediate circumstances, not a particular fact from which an inference can be drawn.

Lord Thankerton: That is rather another way of putting it. It might be made before and yet be an immediate circumstance before the incapacitating. Is it not clear, first of all, that the subject of the enquiry is the cause of that person's death?

Mr. Handoo: Yes, my Lord.

Lord Thankerton: And it has to be something relevant to ascertaining the cause of the death.

Mr. Handoo: Yes, my Lord.

Lord Thankerton: What you said just now about the relationship is a fact spoken to so long before the death that it was not an immediate circumstance and yet would be before the incapacity set in. How are you putting it? Your argument, as stated in the first head, is that you confine it to a statement made after the incapacity. It might be before the incapacity and still immediate.

Mr. Handoo: Perhaps my submission was not properly put.

Lord Thankerton: Do not depart from it if you have anything to say; but the present statement does not cover your argument really.

Mr. Handoo: I submit that the statement must relate to the immediate circumstances; that is, the circumstances just previous to the injury or perhaps immediate to the making of the declaration.

Lord Porter: The problem is as to what the meaning of "transaction" is there; the transaction leading to the death; how far you can go away from a transaction to deal with something leading up to it.

Mr. Handoo: Yes, my Lord.

Lord Wright: It is not a very apt term, but its meaning is clear. A circumstance of the transaction was said to be the assignation and one of the circumstances of the transaction is she went out at his request.

Lord Atkin: In other words, supposing she had said to her sister "I am going out to meet Cheng," would that be admissible under this?

Mr. Handoo: I submit not, my Lord.

Lord Atkin: The transaction which resulted in her death was her meeting Cheng, was it not, or was the transaction only confined to the time when he put his hand round her neck and strangled her?

Mr. Handoo: If he did strangle her, my Lord.

Lord Atkin: I am assuming that. For this purpose we must assume the girl was murdered.

Mr. Handoo: I submit, my Lords, that, if the girl had made that statement after she had been injured, then you might have said that it was a statement made by a person as to any of the circumstances of the transaction. If, for instance, she had been injured and the men had attempted to strangle her as a result of which she subsequently died, then you might say that the circumstances of the transaction ultimately resulted in her death.

Lord Atkin: If she said: "It was Cheng who strangled me."

Mr. Handoo: No, if it had been attempted and she had run away and was found in a half strangled condition and she subsequently died, she might have then said: "My condition is due to the fact that I had a quarrel with Cheng and he attempted to throttle me."

Lord Thankerton: That would come under the first part of the statement as to the cause of death, whereas the other means something wider, a transaction or circumstance which resulted in death.

Lord Wright: It is a phrase which may be criticised, but it is sensible now. It is difficult to think of a better which would cover the broad ambit which the draftsman fully intended to cover. It is intended to be very wide.

Mr. Handoo: It is the opinion of the draftsman that I am trying to put before your Lordships, because the draftsman in this particular Act dealing with section 32 was thinking of a rule against hearsay evidence as it applied in England and exceptions to that rule.

Lord Atkin: I very much doubt that.

Lord Wright: We cannot say that.

Sir George Rankin: As a matter of fact, the select committee which produced the Evidence Act pointed out that you will not find the word "hearsay" in the whole of the Indian Evidence Act from beginning to end and the exceptions to the hearsay rule in English law are dealt with in Indian evidence on other principles namely, by the introduction of the hearsay of things that are relevant to the issue as distinct from things in issue.

Lord Wright: It says: "Such statements are relevant whether the person" and so on; it is as clear as possible.

Lord Atkin: "Transaction which resulted in his death."

Mr. Handoo: The last paragraph of that section was put in by the draftsman merely to meet difficulties which had arisen in England—as to whether the person was in expectation of death. One has only to look at any book on evidence.

Lord Atkin: That is the common law of England; but there is no question in any of their Lordships minds about that. All you have to say is this piece of evidence is not evidence as a circumstance of the transaction which resulted in the death. There can be no doubt that it is a relevant fact, can there?

Mr. Handoo: My Lord, the Chief Justice, who presided at this trial, said it was not relevant to the issue as to who killed her.

Lord Atkin: Did the Chief Justice reject the second part, the statement made to the sister?

Mr. Handoo: He rejected both. The Courts held that the first of the two statements was inadmissible, because it was too remote and that the second statement was not material and admissible because they thought that it came within those words and it would be an unnatural extension of those things or putting something there which did not exist if you restrict them to statements made after the deceased had received an injury.

Lord Atkin: Supposing the girl herself had survived and been attacked by an unknown man, someone she did not recognise; that she said: "Cheng had asked me to meet him at this spot on this day and as I got to the spot I was suddenly attacked," would that not be evidence against Cheng?

Mr. Handoo: If the statement was made after she was attacked.

Lord Atkin: I am assuming now it would be a statement made by a person who had died, because she died from the injuries. That often happens. A dying statement is, of course, made by a person who is alive enough to make a statement between the time of the assault and the time of death. You could not say it was not a relevant fact.

Mr. Handoo: No; we could not say that.

Lord Atkin: If it is a relevant fact that she said something that led to the inference that Cheng had invited her to come there, is that not a circumstance of the transaction which resulted in the death?

Mr. Handoo: I submit not, my Lords. I submit that that would be much too remote. You are given evidence of fact from which you are drawing an inference and I do not see that her statement of going out with Cheng is a transaction which resulted in death.

Lord Atkin: The transaction which resulted in her death is that she met Cheng and he strangled her—I mean, on this assumption—and is it not a circumstance of the transaction that Cheng invited her to meet him?

Lord Porter: Test it on English lines: Suppose that a Magistrate had come to a girl when she was dying and taken her evidence would not she then be entitled to say: "Cheng asked me to meet him?" Suppose she had then died and not gone on to say she did meet him, would that not be evidence against him?

Mr. Handoo: Yes.

Lord Porter: Your argument in that case depends solely on the question that it was not made after the injury but before?

Mr. Handoo: Yes, my Lord.

Sir George Rankin: Also you say it does not mean in all circumstances leading up to the transaction, but that you must confine it in some reasonable sense to circumstances of the transaction. I think there is some authority in your favour on those lines.

Mr. Handoo: Yes; for the interpretations that I am putting before your Lordships I have two cases.

Lord Atkin: Very well; let us hear them.

Mr. Handoo: The first is in Indian Law Reports, 4 Lahore, at page 451, *Autar Singh* v. *The Crown.*

Lord Atkin: What is the date of it?

Mr. Handoo: 1923. Will your lordships turn to page 457, the last paragraph at the bottom of the page.

Lord Atkin: I just want to see what the statements were.

Lord Wright: Some were made some months before and others days before.

Lord Atkin: Will you read that. I want to see the statements. "The prosecutions have put forward two persons, Balwant Singh and his father Gurmukh Singh, who have given evidence of certain statements alleged to have been made by the deceased sometime prior to the date of her death. The statements deposed to by Balwant Singh are said to have been made by the deceased eight or nine months before her death, and those narrated by Gurmukh Singh are alleged to have been made on the 21st September 1922, that is about ten days before the date when she is said to have been murdered." Then he goes on to say they are statements which could only be admitted if they would be shown to come within the provisions of section 32 (1).

Mr. Handoo: Yes, my Lord; then he says: "The learned Government Advocate argues that they do come within these provisions being statements made by the deceased as to the cause of her death or as to the circumstances of the transaction which resulted in her death. I feel constrained to say that I find it hard to believe that such a contention can be put forward seriously. The subsection relied upon by the Government Advocate only applies to the class of statements known as dying declarations, that is to say, statements made by a dying person as to the injuries which have brought him or her to that condition, or the circumstances under which those injuries came to be inflicted. In the case before us, assuming that the statements in question were in fact made, they were made in the one case many months, and in the other many days, before the cause of death. According to the prosecution the cause of death was a shot fired from a revolver. A statement made by the deceased as to the firing of that shot or the circumstances under which it came to be fired would, of course, be admissible in evidence. The statement must be made by the person when he is dying from the result of the injury which caused his death, otherwise it is obviously not a dying declaration. In England there is the additional requirement that the injured person must be aware that he is dying, and the rule only applies in criminal cases and to the case of homicide, but in India the Evidence Act has done away with these two qualifications. In Mr. Justice Stephen's History of the Criminal Law in England the following interesting commentary appears on this rule of evidence as applied to India: "The rule is in many ways remarkable. It has worked, I am informed, ill in India, into which country it has been introduced together with many other parts of the English law of Evidence. I have heard that in the Punjab the effect of it is that a person mortally wounded frequently makes a statement bringing all his hereditary enemies on to the scene at the time of his receiving his wound, thus using his last opportunity to do them an injury. A remark made on the policy of this rule by a native of Madras shows how differently such matters are viewed in different parts of the world. "Such evidences," he said, "ought never to be admitted in any case. What motive for telling the truth can any man possibly have when he is at the point of death?" That, I submit, my Lords, is an authority for the proposition that the statement under this Act must be made after the person has received an injury.

Sir George Rankin: What learned judge was that?

Mr. Handoo: Mr. Justice Fforde.

Lord Atkin: This passage of Mr. Justice Stephen's History of the Criminal Law which is quoted there is based entirely on the footing of the English Law and he is saying, if you apply the dying declaration of the women here, even that is capable of being viewed differently. I do not see anything in this section which does introduce the dying declaration.

Mr. Handoo: He does say the rule has been introduced.

Lord Wright: I do not see in any section that you have dying declarations at all. A person who is dead is only one of the people mentioned in the section when the section says: "statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense".

Lord Atkin: That is 4 Lahore. I think you have another one?

Mr. Handoo: Yes, my Lord, that case was commented upon in another report, Indian Law Reports, 16 Lahore, page 589.

Lord Atkin: What is the date there?

Mr. Handoo: It is the latest case on the subject, I believe, it is *Inayat Khan* v. *The Crown* in 1934.

Lord Atkin: It is Chief Justice Young. This dissents from the decision in the other case.

Mr. Handoo: So it says, my Lord, but, so far as we are concerned, I do not think that there is any actual difference of opinion, so far as my submission is concerned, that statements must be made by a person after he has received an injury. I do not think that they quite understand the remarks of Mr. Justice Fforde in the earlier case. I do not think that there is any actual dissent so far as the earlier case is concerned.

Lord Wright: This is a dying declaration of a man after his injury.

Mr. Handoo: Yes, my Lord.

Sir George Rankin: Is that section 32?

Mr. Handoo: Yes.

Sir George Rankin: What do they hold?

Lord Thankerton: You had better read the previous page where they are referred to.

Mr. Handoo: "The Prosecution evidence consists of the declarations mentioned above and the testimony of the two eye-witnesses, Niaz Mohamed and Sher Khan. There is no reason whatever why the deceased should have falsely implicated the accused and desire to allow the real culprit to go unpunished. The learned counsel for the appellant urged that the declarations made by the deceased before the sub-inspector and Diwan Chand could not be said to be dying declarations and were, therefore, inadmissible in evidence. He relied on the remarks of Fforde, J. in *Autar Singh* v. *The Crown* in support of his contention. These remarks are to the effect that under the English Law a dying declaration is admitted only if the injured man was aware that he was dying from the result of the injury received by him". I would draw your Lordship's attention to that particular passage: "a dying declaration is admitted only if the injured man was aware that he was dying from the result of the injury received by him". I do not believe that Mr. Justice Fforde intended to say that in the earlier case. It goes on: "The Indian Evidence Act, however, does not use the expression 'dying declaration' at all. Section 32, clause (1) of the Indian Evidence Act merely lays down that a statement made by a person who is dead is relevant, when the statement is made as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. It is clear that the Indian Legislature deliberately departed from the corresponding English Law on the subject. The wide words used in the clause referred to above show that it was intended to cover statements other than dying declarations strictly so called. The view taken by Mr. Justice Fforde in the ruling cited above was dissented from by a Bench of the Bombay High Court in *Shivabhai* v. *Emperor*. We are of opinion clearly that, under the Indian Evidence Act, a statement made by a person who is dead, as to the cause of his death is admissible in evidence, even though he was not aware that he was dying when he made it".

Lord Atkin: I cannot understand myself why the judges should trouble to draw inferences about when they have a statement in the Act of Parliament that such statements are relevant whether the person who made them was or was not at the time when they were made under the expectation of death. You have only to refer to those words and the whole thing is solved. There is also a case in 50 Bombay.

Sir George Rankin: That is also against you on the other point that it was before the transaction took place in which the person was killed.

Lord Atkin: Is that 50 Bombay?

Mr. Handoo: Yes, my Lord. 50 Bombay, page 683.

Lord Atkin: Is there anything else you want to say on this?

Mr. Handoo: There is one other case I should like your Lordships to examine and that comes a little closer to Singapore. It is in the Federated Malay States Law Reports, at page 229.

Lord Atkin: Would it be in the Law Journal?

Mr. Handoo: I have not been able to find this case anywhere else, my Lord.

Lord Atkin: What is the date of it?

Mr. Handoo: It is 1932.

Lord Atkin: What month?

Mr. Handoo: 2nd February, 1932. It is *Haji Salleh and Marjuki* v. *The Public Prosecutor*.

Lord Atkin: Will you read the head-note.

Mr. Handoo: It says: "A statement cannot be admitted as a dying declaration under section 32 (1) of the Evidence Ordinance unless it relates to the actual transaction which resulted in the death, and not to previous events which are not part of the same transaction. Section 32 (1), inasmuch as it enlarges the scope of the English law, must be construed strictly".

Lord Atkin: Then it states the facts.

Mr. Handoo: Yes. "The appellants were convicted of the murder of Mustrin before Mr. Justice Thorne, with Assessors. The conviction rested on the evidence of one witness a boy of eleven or twelve years of age, but some corroboration was found in a statement made by the deceased about a month before the murder as follows: 'Musrim said he was afraid of No. 2 accused who had been looking for him every night. He said he was afraid No. 2 might kill him or do some harm to him'."

Lord Atkin: How that could be said to be a circumstance of the transaction which resulted in the death is plain.

Lord Thankerton: It is quite plain.

Lord Atkin: The judges, Mr. Justice Sproule and Mr. Justice Burton, might have said something.

Mr. Handoo: They say: "The English law relating to dying declarations agrees in principle with ours, except that it is much more reluctant to allow such hearsay evidence to be proved even when the origin of it is clear. In England the proof of dying declarations as these is confined to homicide cases only; and our law has excluded the restriction that the declarant must be under the immediate expectation of death, with death ensuing without mediate improvement. The case of *Rex* v. *Mead* makes it clear that the subject of the dying declaration must be confined to the *res gestae*, to the injury and the immediate circumstances of the cause of death. The fact that we have enlarged the scope of the rule makes it necessary to construe the words as strictly as possible. We think, therefore, that the statement should be rejected as not being part of the transaction which resulted in Musrin's death. And if the statement is rejected, we have only the evidence of the boy, a child of tender years". Those are the authorities in support of the proposition as to how statements must be read and that, in so far as the Evidence Ordinance departed from the English rule, it must be construed strictly.

Lord Atkin: I cannot understand the point about *Mead*. All *Mead* decided was this: "Defendant having been convicted of perjury, a rule *nisi* for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor, and on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose: Held that it could not be read; for that dying declarations are admissible only where the death is the subject of the declaration". Is that all you have to say?

Mr. Handoo: So far as that particular point is concerned.

Mr. Handoo then proceeded to deal with his other submissions which were based on the facts and on alleged misdirection.

Lord Atkin: Their Lordships are unable to advise His Majesty to grant leave to appeal in this case.

Leave refused.

Solicitors for the Petitioner—*S. L. Polak & Co.*

Solicitors for the Crown—*Burchells.*

[*Note.*—The point has now been further dealt with by the Privy Council in the case of *P. N. Swami* v. *King Emperor* (1939) 8 M.L.J. 59.]